

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**WARBELOW'S AIR  
VENTURES, INC.**

FAA Order No. 99-4

Served: July 1, 1999

Docket No. CP97AL0012

**ORDER DENYING COMPLAINANT'S MOTION TO DISMISS BUT  
GRANTING ADDITIONAL TIME FOR REPLY BRIEF<sup>1</sup>**

Complainant Federal Aviation Administration (FAA) has filed a motion to dismiss the untimely appeal brief of Respondent Warbelow's Air Ventures, Inc. (Warbelow's). This order: (1) finds good cause for excusing the lateness of Warbelow's appeal brief; (2) denies Complainant's motion to dismiss; and (3) grants Complainant additional time to file a reply brief.

**I. Background**

On December 15, 1998, Chief Administrative Law Judge Roy J. Maurer served his written initial decision in this case on the parties. After finding that Warbelow's had violated 14 C.F.R. §§ 91.7(a), 135.25(a)(2), and 135.179(a), Chief Judge Maurer assessed the company a \$5,500 civil penalty. Apparently, neither party was wholly satisfied with the initial decision because each of them filed a notice of appeal.

Under the Rules of Practice, a party who wishes to appeal must perfect its appeal by filing an appeal brief not later than 55 days after the service date of an initial decision served by mail.<sup>2</sup> As a result, each party's appeal brief was due not later than February 8,

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<sup>1</sup> The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 64 Fed. Reg. 1855, 1871 (January 12, 1999).

<sup>2</sup> 14 C.F.R. § 13.233(c) provides, in relevant part, as follows: "[A] party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker." The parties had an additional 5 days, however, because the law judge served his decision by mail. See

1999. Complainant filed a timely appeal brief on February 8, 1999, but Warbelow's did not file its appeal brief until February 16, 1999. Thus, Warbelow's appeal brief was 8 days late.

On February 19, 1999, Complainant moved to dismiss Warbelow's appeal, stating that "there does not appear to be good cause to excuse [the] untimely filing." In the alternative, Complainant asked for an extension of time to file its reply brief.

On February 25, 1999, Warbelow's filed a document opposing Complainant's motion to dismiss. Warbelow's asked the Administrator to accept its late-filed appeal brief. Counsel explained that in calculating its 55-day deadline for perfecting the appeal, counsel mistakenly started from the service date of the notice of appeal rather than from that of the initial decision.

## II. Good Cause

Under the Rules of Practice, the Administrator may excuse the untimely filing of an appeal brief if good cause for extending the deadline is shown. (*See* 14 C.F.R. § 13.233(c)(2), providing that "[t]he FAA decisionmaker may grant an extension [of time for perfecting an appeal] if good cause for the extension is shown.")

Under the circumstances of this case, good cause is present. Counsel for Warbelow's had no prior experience with FAA civil penalty appeals and simply calculated the deadline starting from the wrong date (the service date of the notice of appeal rather than that of the initial decision). Late filing has been excused in the past in part due to counsel's unfamiliarity with FAA civil penalty procedures. In the Matter of Cornwall, FAA Order No. 92-47 at 4-5 (July 22, 1992) (also stating that the law judge's concern that the respondent would be penalized unfairly for his counsel's error was appropriate).<sup>3</sup>

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14 C.F.R. § 13.211(e), which provides as follows: "Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, 5 days shall be added to the prescribed period."

<sup>3</sup> Indeed, the late filing of an appeal brief has been excused even where counsel was "not new to practice before the Administrator" but was uncertain about whether the Administrator had jurisdiction over the matter. In the Matter of Wendt, FAA Order No. 93-2 (January 13, 1993).

*But see* In the Matter of Costello, FAA Order No. 92-1 (January 9, 1992), where the respondent apparently made the same mistake as Warbelow's counsel (erroneously calculating the deadline for filing the appeal brief starting from the notice of appeal rather than from the initial decision) and the Administrator rejected the late-filed appeal brief, stating that "I am ... of the view that misinterpreting the Rules of Practice does not constitute good cause." FAA Order No. 92-1 at 6. Costello, is perhaps, unnecessarily harsh, and there are times when the beauty of requiring strict adherence to deadlines must give way to a rule of reason that considers the total circumstances. While that was not necessary in Costello, because there the notice of appeal was sufficiently detailed to serve as an appeal brief, Warbelow's is such a case.

The record indicates that Warbelow's counsel took steps to protect against the danger of default – *e.g.*, by reviewing the Rules of Practice and by drafting a memorandum containing instructions to others in the firm regarding calendaring of the appeal.<sup>4</sup> Despite counsel's efforts to file the appeal brief on time, it was late due to simple human error.

Counsel has committed no previous defaults in this case. Counsel states in his affidavit that he would have filed a request for an extension of time had he not believed in good faith that the appeal brief was on time. He states further that Complainant's motion to strike was his first notice that the appeal brief was late.

The appeal brief was only 8 days late, and Complainant has neither alleged nor shown any prejudice resulting from the delay. As in a previous case, although the showing of good cause is marginal here, it is sufficient to accept the late-filed document, especially since "[w]herever possible, matters should be disposed of on the merits ... rather than summarily because of a procedural defect." In the Matter of Safety Equipment & Sign Co., FAA Order No. 92-76 at 2 (December 21, 1992), citing In the Matter of Cornwall, FAA Order No. 92-47 (July 22, 1992).

*THEREFORE*, Complainant's motion to dismiss is denied, but its motion for an extension of time to file its reply brief is granted. Complainant is granted 30 days from the service date of this order, plus an additional 5 days under 14 C.F.R. § 13.211(e), to file a reply brief.

JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

VICKI S. LEEMON<sup>5</sup>  
Manager, Adjudication Branch

Issued this 1<sup>st</sup> day of July, 1999.

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<sup>4</sup> See counsel's affidavit attached to Warbelow's Opposition to Complainant's Motion to Dismiss Appeal, as well as Exhibit B.

<sup>5</sup> Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (see 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.